IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CECIL R. REED, Appellant, vs. STEWART L. UDALL, Secretary of the Department of the Interior of the United States, and individually; J. R. PENNY, Nevada State Director, Bureau of Land Management, U.S. Department of the Interior, and individually, and VAL B. RICHMAN, District Manager, Carson City Office, Bureau of Land Management, U.S. Department of the Interior, and individually. Appellees.	Dec. 22, 154

APPEAL FROM THE DISTRICT COURT

OF THE UNITED STATES FOR THE

DISTRICT OF NEVADA

BRIEF FOR THE APPELLANT

II. STATEMENT OF PLEADING AND FACTS ESTABLISHING JURISDICTIONAL BASIS.

Jurisdiction of this court and of the district court below is based upon the following pleadings and facts:

1. On April 15, 1955, Cecil R. Reed, appellant here and plaintiff below, filed with the Reno, Nevada Land Office, Bureau of Land Management, U. S. Department of the Interior, an application, Nevada 034275 (Ex. E) under the general homestead laws (43 U.S.C. 161 et seq.) for entry upon 160 acres of lands owned by the United States and located in what is known as the Carson Valley area of Douglas County, State of Nevada (R. 2-3).

2. Appellees Richman and Penny, defendants below, were employees of the United States who classified or supervised classification of the lands applied for, and such lands were classified as suitable for agricultural entry under the general or "ordinary" homestead laws, such classification decision bearing date of April 29, 1957 (Ex. F; R. 3-4).

3. Reed, on or about May 25, 1957, entered upon the lands, established a residence there, proceeded to comply with the Federal homestead laws, and by reason thereof acquired certain rights and interests in and to the lands so applied for, so classified, and so entered (R. 4).

4. On May 11, 1961, Reed submitted final proof of compliance with the homestead laws to the Nevada Land Office (Ex. K; R. 4).

5. By letter from the land office dated March 1, 1962 (Ex. M; R. 4-5), Reed was notified that his final proof was "not acceptable

to issue a patent for the one hundred and sixty (160) acres embraced in your entry, but, for only one-half of the entry, or eighty (80) acres." Reed was by said letter, given thirty (30) days to relinquish a specified eighty (80) of the entered acres, failing which, he was advised, the land office at Reno would initiate a contest of Reed's final proof, such contest to be designed to cancel the entire one hundred and sixty (160) acre entry.

6. On April 18, 1962, the United States of America, as contestant acting through defendant Penny, and notwithstanding earlier advice and conclusion by the Nevada Land Office that Reed's final proof was acceptable to issue a patent for at least eighty (80) acres, caused action to be initiated in the form of a contest designed to invalidate, cancel, and make nugatory Reed's entire one hundred and sixty (160) acre homestead entry (Ex. V; R. 4).

7. Issues were joined and a hearing had on June 20, 1963 before a Bureau of Land Management hearing examiner, said hearing conducted under applicable regulations of the Department of the Interior (Part 221, Title 43, C. F. R., redesignated on March 31, 1964 as Part 1840; 29 F. R. 4326); and the Administrative Procedure Act (Sec. 1001 et seq, Title 5, U. S. C. A.) with testimony formally reported (Tr. 1-142; R. 4).

8. By written decision dated December 13, 1963, United States v. Cecil R. Reed, Nevada 3296 (Admin. File) the examiner concluded Reed was entitled to have his entry go to patent upon submission of technical proof respecting military service, remanded the case to the Nevada Land Office, in effect dismissing the contest

charges (R. 5-6).

9. On January 9, 1964, the United States appealed the hearing examiner's decision to the Director, Bureau of Land Management (R. 6), by decision dated July 7, 1964, the Bureau of Land Management, through its Acting Director, issued a decision, United States v. Cecil R. Reed, Nevada 034275, Contest 3296, reversed the decision of the hearing examiner, rejected the final proof of Reed, and ordered the entire entry cancelled (Admin. File; R. 6).

10. Reed appealed to the Secretary of the Interior and thereafter, by decision dated September 29, 1965, United States v. Cecil R. Reed, A-30354, that office affirmed the decision of the Bureau of Land Management (Admin. File; R. 6).

11. Reed asserted that by reason of the referenced four (4) administrative decisions - - Nevada land office; hearing examiner; Director, Bureau of Land Management; and the Secretary of the Interior - - he had exhausted his administrative remedies in that the applicable regulations of the department, Sec. 1844.9, Title 43, C. F. R. (Apr. 1, 1964 Supp.), provide that no appeal will lie in the Department of the Interior from a decision of the Secretary (R. 6).

12. On November 29, 1965, Reed filed a complaint in the United States District Court for the District of Nevada (R. 2-10), asserting, inter alia, that the final administrative decision of the Secretary of the Interior was arbitrary and erroneous, against the law, not sustained by the evidence and contrary to the facts: that, under applicable law, Reed was entitled to have his entry allowed and to have patent issue to him; that the decision of the Secretary was

arbitrary and erroneous because not consistent with applicable principles of equity; and that Reed was entitled as a matter of right to have the decision of the Secretary judicially reviewed by a Federal district court pursuant to the following statutory authorities (R. 3):

(a) that the individuals named as defendants are officers and employees of the United States or an agency thereof with the intent and meaning of Section 1391 (e), Title 28, U.S.C.A.: that the action brought is one within the scope and purview of Section 1361, Title 28 U.S.C.A., and subsection (e) (3) of said Section 1391:

(b) that the action brought was one to judicially review actions or decisions of the named defendants, acting or purporting to act in an official capacity or under color of legal authority, as such review is contemplated and authorized by Section 10 of the Administrative Procedure Act (Sec. 1009, Title 5, U.S.C.A.) and by Section 1391 (e), Title 28 U.S.C.A.; and that jurisdiction and venue resided in the Nevada district court for such statutory reasons, and the further fact that plaintiff is a resident of Nevada, and that the real property involved in the action is located in Douglas County, Nevada, as set out in the complaint (R. 2-3).

13. Plaintiff below sought this relief: (R. 8-9): temporary restraining order, restraining defendants' interference with plaintiff's use and enjoyment of the property; a preliminary injunction pending a final and complete hearing on the merits; a permanent injunction, full judicial review of the decision of the Secretary of the Interior, reversal of the Secretary's decision, and such orders or writs as are deemed necessary to make fully force and effective the

declaration of the hearing record.

14. Answer of the United States (R. 26-29) was filed, including agreement by the Department of the Interior (R. 30) assuring maintenance of "****the status quo as far as the land involved is concerned during the pendency of the litigation." (R. 30) thus obviating formal action on the restraining order and injunction requests.

15. Minutes of the Court (R. 47) for September 9, 1966 reflect pre-trial determinations, including this entry:

> "****Counsel for the Plaintiff makes an offer of proof, to which the same is rejected on the grounds that the evidence is limited to the Administrative Record lodged with the Clerk."

The Court thereupon ordered the matter determined on the Administrative Record, and submission on briefs.

16. Plaintiff's Opening Brief (R. 50-87), Defendant's Answering Brief (R. 88-108) and Plaintiff's Reply Brief (R. 110-121) were filed with the District Court; under date of July 7, 1967, the court below entered an "Order Granting Summary Judgment" for the United States (R. 122-126).

17. By timely motion for new trial and motion for reconsideration, Plaintiff below asserted inter alia that the summary judgment was improperly entered (R. 127-132), and after responsive pleading by the United States thereto and setting of arguments (R. 133-141), and

18. By Judgment entered on December 19, 1967 (R. 142-143), and "Supplemental Opinion, Findings of Fact and Conclusions of Law"

bearing the same date (R. 144-147) the district court again found for the United States, upholding the decision of the Secretary of the Interior rejecting Reed's final proof and ordering cancellation of the entire 160-acre entry.

19. Jurisdiction on appeal resides in the United States Circuit Court of Appeal for the Ninth Circuit pursuant to Section 1291, Title 28 U.S.C.A.

III. STATEMENT OF THE CASE.

(1) Incorporation of Record.

Because the record here involves administrative action or judicial proceedings had at five different levels -- Nevada land office decision adverse to appellant Reed; hearing examiner decision favorable to Reed; decision of Bureau of Land Management unfavorable to Reed; decision of Secretary of the Interior affirming Bureau of Land Management decision; and decision of the Nevada Federal district court upholding the final determination of the Secretary of the Interior -- counsel for appellant has attempted, supra, to set out background information in more detail than would be required in a simple appeal from a decision of a Federal district court resulting from an action originating there.

In turn, in these circumstances, appellant incorporates by reference in this brief all of the files, records, and pleadings, and arguments made in the judicial and administrative proceedings below. Particular reference is made: to Plaintiff's Pretrial Memorandum of Contentions of Fact and Law (R. 27-45), and Defendant's Pretrial

Memorandum (R. 32-38) and in Plaintiff's Opening Brief (R. 50-87), Defendant's Brief (R. 88-109), and in Plaintiff's Reply Brief (R. 110-121) filed in the proceedings had in the United States District Court for the District of Nevada.

(2) The questions involved, and the manner in which they are raised.

The court below in its 'Order Granting Summary Judgment' (R. 122-126) bottomed its judgment for defendants, in effect, on a single point found by the court to be dispositive of Reed's appeal to the Secretary in this language (R. 122):

> We need not consider all the arguments made by plaintiff in his attack upon the proceedings in the Interior De- (R. 123)partment and the final decision of the Secretary inasmuch as one of them seems to us to be dispositive of the case.
>
> The Government contest of the application for homestead patent alleged: "That the designated contestee has not met the cultivation requirements * * * in the development of his homestead entry * * *." The statute requires: "That the entryman shall, in order to comply with the requirements of cultivation herein provided for, cultivate not less than one-sixteenth of the area of his entry, beginning with the second year of the entry, and not less than one-eighth, beginning with the third year of the entry and until final proof * * *." 43 U.S.C. 164. The law (43 U.S.C. 279) gives two years' credit for residence and cultivation to an honorably discharged veteran homestead entryman, but it, too, provides: "No patent shall issue to any person who has not resided upon his homestead and otherwise complied with the provisions of the homestead laws for a period of at least one year; Provided, that such compliance shall include bona fide cultivation of at least one-eighth of the area entered under the homestead laws * * *."
>
> So plaintiff, a veteran, was required to cultivate in good faith twenty acres of his one hundred sixty acre entry to qualify for a patent. On this issue, the Secretary found as follows:

"Since the only entry year in which the entryman purported to cultivate 20 acres was his fourth, if he did not cultivate 20 acres in that year, his final proof must be rejected and cancelled."

"The appellant's allegation that he cultivated and planted 20 acres of oats cannot be accepted as substantiated. The land examiner, testifying on behalf of the United States, stated that when he visited the land on January 5, 1962, he found 'approximately twenty acres of partially cleared land' (Tr. 29, 38), that all the native vegetation had not been removed, and that 'sagebrush was still left (R. 124) standing in the fields, which would interfere with a proper tillage or cultivation of the fields' (Tr. 38). He stated that he saw no evidence of tillage for a crop other than native grasses (Tr. 39), and that no stubble of any oat crop at all was on the land (Tr. 40). If an oat crop had been grown or raised, stubble would have remained (Tr. 40)."

"The appellant agreed that there was no evidence of an oat crop in January 1962 (Tr. 101, 102), although he said it grew 8 inches high (Tr. 104). He gave no explanation as to why no stubble remained *****. This argument, founded on the merest of inferences, is completely unacceptable.

"In opposition the entryman offered only his own testimony to support his claim that he had cultivated 20 acres. It is noteworthy that he did no present either of the persons who submitted statements as part of his final proof that he had cultivated 20 acres in 1961. Since the final proof of an entryman is required to be corroborated by the testimony of two credible witnesses, Rev. Stat. sec. 2291 (1875), as amended, 43 U.S.C. sec. 164 (1964), it seems that evidence of no less weight should be required in a contest challenging lack of cultivation.

"The burden of proof rests on a homestead entryman to establish by a preponderance of the evidence that he has met the requirements of the law. Stewart v. Penny, 238 F. Supp. 821 (D. Nev. 1965). Appellant's testimony, standing alone without corroboration, falls far short of the preponderating evidence required.

"Therefore, I conclude that the required number of acres was not cultivated during the fourth entry year." (emphasis supplied).

* * * * *

The decision below, by the Federal district court for the district of Nevada, it will be seen, adopted the reasoning of the

Secretary of the Interior. The court below found in effect that entryman Reed's testimony " * * standing alone without corroboration * * * does not meet the preponderating evidence required." (R. 124 and supra). It should be noted, parenthetically, that the Government produced only a single witness, Mr. Hayhart (Tr. rules, p. 5 and Tr. 1-147) and that there was in fact received into evidence by the hearing examiner, without Government objection the Final Proof Submission of Reed (Ex. K; Tr. 13), which evidence included in the very affidavit form required by law the sworn testimony of two witnesses before the officer designated by the United States (Ex. J), as contemplated and required by R. S. 2291, as amended, 43 U.S.C. sec. 164. The court below in supporting the Secretary's finding, nevertheless, concluded (R. 124):

> We think this finding [by the Secretary] is supported by the record and justifies the decision sustaining the Government contest and denying the application for patent. The entryman's effort to [R. 125] comply with the cultivation requirements of the homestead laws was niggardly at best. The burden of his argument is that the Secretary was required to accept his uncorroborated testimony that he had cultivated twenty acres.
>
> * * * * * *

Thus delimited by the court below, the following brief statement reflects appellant's position: Entryman Reed, in fact and in law, did meet the burden of proving compliance with the homestead law, and is entitled to have patent issue to the full 160 acre-entry. Reed contends that, in fact and law, he had fully met the corroboration requirement.

Additionally this observation seems in order the facts of the case are not complex as to detail. The manner of factual development and the shifts of emphasis in application of the law to them through the

administrative and judicial processes below -- at four different administrative decisional levels, and particularly in the form of the narrow base upon which the lower court decision rests -- makes determination of the manner of presentation here somewhat difficult.

To preserve appellant's position respecting the whole decision of the Secretary without expanding this brief, appellant incorporates by reference herein his Pretrial Memorandum of Contentions of Fact and Law filed in the United States District Court of Nevada (R. 37-45) together with Plaintiff's Opening Brief (R. 50-86), Plaintiff's Reply Brief (R. 110-121), and the argument therein contained.

Accordingly, appellant in this brief to the court will restrain only one proposition in addition to that involving corroboration:

Appellant contends that, on the whole record, appellant-entryman is entitled to have his final proof allowed, when tested by 'good faith' standards on both a legal and an equitable basis.

IV. SPECIFICATION OF ERRORS.

The district court erred in the following particulars:

1. In failing to conclude, as a matter of law, that the entryman failed to meet the burden of proving compliance with the Homestead Law.

2. In failing to conclude that, in fact and in law, the entryman is entitled to have his final proof allowed, when tested by 'good faith' requirements.

V. ARGUMENT.

1. Summary of Appellant's Position.

Appellant contends that:

(a) The law applicable to the quality of final proof, and the form of final proof, has been wholly complied with in this case. The lower court, in its decision, erroneously overlooks and discounts these facts: that Reed, as a part of his final proof submission filed affidavits of sworn testimony of two witnesses; that the sworn testimony of these two disinterested witnesses was taken before an officer designated by the United States in accordance with its usual procedure; that the testimony was taken following publication in a manner, at times prescribed, and in a text mandated by the United States; that interested persons, including employees of the United States, were thus noticed to appear at the time such testimony was taken; and that the testimony--thus adduced according to applicable statutory requirements and admitted into evidence without objection at the hearing before the hearing examiner -- constitutes all of the corroboration of Reed's final proof and testimony contemplated, or required, by the Homestead Law.

(b) Measured by court-declared standards, and by administrative agency direction and decision, for weighing "good faith", the whole record here supports a finding that this entryman has met those standards.

2. The proof of compliance tendered by the entryman in the instant case is as fully corroborated as is required and contemplated by the applicable law, and the entryman is entitled to issuance of a patent to his full 160-acre entry.

Reference is made to the laws applicable to final proof:

(a) Basic Homestead Law.

The provisions of the basic Homestead Law, applicable to agricultural entry or 'ordinary' homesteads, as in the instant case, pertinent here are found codified in Title 43, U.S.C.A., secs. 161-169.

Sec. 164 (R.S. 2291) provides in relevant part:

> No certificate shall be given or patent issued therefore until the expiration of three years from the date of such entry; and if at the expiration of such time, or at any time within two years thereafter, the person making such entry, * * * proves by himself and by two credible witnesses that he, she, or they have a habitable house upon the land and have actually resided upon and cultivated the same for the term of three years succeeding the time of filing the affidavit and makes affidavit that no part of such land has been alienated, * * * then in such case he, she, or they, * * * shall be entitled to a patent as in other cases provided by law. * * * Provided further, That the entryman shall, in order to comply with the requirements of cultivation herein provided for, cultivate not less than one-sixteenth of the area of his entry, beginning with the second year of the entry, and not less than one-eighth, beginning with the third year of the entry and until final proof. * * *.' (emphasis supplied).

(b) Military Service Credit.

Requirements respecting proof for military veterans are qualified by provisions now codified at Title 43 U.S.C.A., sec. 279, in pertinent part:

> * * *Credit shall be allowed for two years' service to any person who served in the military or naval forces of the United States * * *. No patent shall issue to any such person who has not resided upon his homestead and otherwise complied with the provision of the homestead laws for a period of at least one year: Provided, That such compliance shall include bona fide cultivation of at least one-eighth of the area entered under the homestead laws; * * *.'

(c) Statutory Provisions for Final Proof.

Provisions now codified at Title 43 U.S.C.A., secs. 251, 252.

and 254 are pertinent here:

> Before final proof shall be submitted by any person * * * such person shall file * * * a notice of his or her intention to make final proof, stating therein the description of the lands to be entered, and the names of the witnesses by whom the necessary facts will be established. Upon the filing of such notice, the (land office) officer shall publish a notice, that such application has been made once a week for the period of thirty days * * *. Such notice shall contain the names of the witnesses as stated in the application. At the expiration of said period of thirty days, the claimant shall be entitled to make proof in the manner provided by law. The Secretary of the Interior shall make all necessary rules for giving effect to the foregoing provisions.

20 Stat. 472, 43 U.S.C.A. 251. (emphasis supplied)

And the following section headed "Time of taking testimony for final proof * * *" contains language which aids in weighing the quality of support for the entryman's proof:

> Section 251 of this title shall not be construed to forbid the taking of testimony for final proof within ten days following the day advertised * * *. 43 U.S.C.A. 252 (emphasis supplied).

Title 43 U.S.C.A., sec. 254 contains provisions respecting officers before whom affidavits or proofs may be made, and declares that "* * *any witness making such proof" who knowingly, willfully, or corruptly swears falsely "* * *to any material matter contained in said proofs * * *" shall be deemed guilty of perjury.

(d) Departmental Regulations: Final Proof.

Regulations in effect at the time Reed submitted final proof dated May 11, 1961 (Ex. J) were contained in Title 43, C.F.R., secs. 166.44 through 166.50 under the heading "Procedure Governing Submission of Final or Commutation Proof."

A headnote reads: "AUTHORITY: secs. 166, 44 to 166, 50 issued under 20 Stat. 472; 43 U. S. C., 251." , the statutory and code provisions quoted, supra, as sec. 251. They are now codified, Title 43 C. F. R. (Jan. 1, 1968 Revision) as secs. 2211.1-4 (a)(1) through 2211.1-4 (d)(2).

Attention is directed to the pertinent language in sec. 166.45 of Title 43, C. F. R. (sec. 2211.1-4 (c)(1), Tit. 43 C. F. R., Jan. 1, 1968 Revision):

> Any person desiring to make homestead proof should first forward a written notice of his desire to the manager of the land office, giving his post-office address, the number of his entry, the name and official title of the officer before whom he desires to make proof, the place at which the proof is to be made, and the name and post-office addresses of at least four of his neighbors who can testify from their own knowledge as to facts which will show that he has in good faith complied with all the requirements of the law. (Emphasis supplied.)

The same regulations govern time of making proof, officers qualified to take proof, publication requirements, and in sec. 166.47, the provision controlling in 1961, recite (emphasis supplied) that:

> "Final proofs in all cases where the same are required * * * should be taken in accordance with the published notice: Provided, however, That such testimony may be taken * * *."

(e) Regulations Controlling Government Contests.

On April 18, 1962, the United States initiated a contest of appellant's final homestead proof in the form of a complaint (Ex. V). The complaint itself, and the hearing examiner proceeding which followed, was asserted by the United States and found by the hearing examiner (Examiner's decision, December 12, 1963, United States v. Cecil R. Reed, Admin. File, p. 1) to have been initiated and conducted

pursuant to Title 43 C. F. R., Part 221, under sec. 221.97 thereof relating to Government contests (now redesignated sec. 1852.2 pt. sec. Tit. 43 C. F. R., Jan. 1, 1968 Revision)

Regulations governing Government contests in effect at the time Reed submitted final proof dated May 11, 1961 (Ex. J), were carried under Part 221 under the heading "Appeals and Contests"

The headnote reads "AUTHORITY: secs. 221.1 to 221.197 issued under R. S. 2478, as amended; 43 U. S. C. 1201." The statutory provision cited reads in its entirety:

> The Secretary of the Interior, or such officer as he may designate, is authorized to enforce and carry into execution, by appropriate regulations, every part of the provisions of this title not otherwise specifically provided for.

R. S. 2478, 43 U. S. C. A. 1201.

Detailed examination of the regulations governing evidence in Government contests, so far as relevant to this appeal, reveals this language in sec. 221.74 (a) under heading of "Evidence" / since redesignated sec. 1852.3-6 (a), Tit. 43 C. F. R., Jan. 1, 1968 Revision

> All oral testimony shall be under oath and witnesses shall be subject to cross examination. The Examiner may question any witness. Documentary evidence may be received if pertinent to the issue. The Examiner will summarily stop examination and exclude testimony which is obviously irrelevant and immaterial.

We turn, then, to the application of the foregoing statutory and administrative regulations to the instant case.

(f) The Secretary's Decision and Conclusion of the United States District Court.

As set out above (pps. 8-10, this brief) the Secretary of the Interior and the district court below find unity in their rationale which

would cancel the Reed entry more than 12 years after application for entry (Ex. E, Tr. 13), and some ten years after entry was allowed (Ex. F, Tr. 13) in these words and phrases:

> "In opposition (to the testimony of the lone Government witness) the entryman offered only his own testimony to support his claim that he had cultivated 20 acres. * * * Appellant's testimony, standing alone without corroboration, falls short of the preponderating evidence required.",

and the court below, having adopted the foregoing language from the Secretary's decision, determined that such finding was supported by the record, and characterized entryman Reed's position in this language (R. 125):

> "The burden of his argument is that the Secretary was required to accept his uncorroborated testimony that he had cultivated twenty acres."

In support of its decision, the court below relied upon two decisions. Stewart v. Penny, 238 F. Supp. 821 (1965) was decided by the court from which this appeal is taken. The court in Stewart concluded that the burden of proof is upon the contestee and that the government 'bears only the burden of going forward with sufficient evidence to establish a prima facie case, and the burden then shifts to the claimant to show by a preponderance of the evidence that his claim is valid.' 238 F. Supp. 821, 831, citing with approval Foster v. Seaton, 271 F. 2d 836 (1959).

We suggest, without argument because not deemed necessary to appellant's position here, that it is the Government -- and not the homestead entryman -- who is 'the proponent of a rule or order' within the meaning of the provision of the Administrative Procedure Act which so imposes the burden of proof under 5 U.S.C.A. 1006 (c).

The court below (R. 125-126) draws heavily on language from Quock Ting v. United States, 140 U. S. 417 (1891) in this fashion (emphasis supplied):

> Undoubtedly, as a general rule, positive testimony as to a particular fact, uncontradicted by any one, should control the decision of the court; but that rule admits of many exceptions. There may be such an inherent improbability in the statements of a witness as to induce the court or jury to disregard the evidence, even in the absence of any direct conflicting testimony. He may be contradicted by the facts he states as completely as by direct adverse testimony; and there may be so many omissions in his account of particular transactions, or of his own conduct, as to discredit his whole story. His manner, too, of testifying may give rise to doubts of his sincerity, and create the impression that he is giving a wrong coloring to material facts. All these things may be considered in determining the weight which should be given to his statements, although there be no adverse verbal testimony adduced.'

The court below appears to characterize Reed's testimony as related to testimony having these elements -- 'a particular fact, uncontradicted by any one", as given "in the absence of any direct conflicting testimony', and as standing "although there be no adverse verbal testimony adduced".

It is noted that Quock Ting is read by the court below as holding (R. 125) that --

> "* * *the trier of fact may give little credence to evidence although uncontradicted."

And the court below continues (R. 126) --

> "It is no hardship on the entryman to require him to produce sound, credible evidence of compliance which he easily can prepare in the form of surveys, photographs and testimony of neighbors of his work of proving up the homestead progresses."

Following, we recite what we believe to be the controlling judicial precedents, and the facts respecting corroboration overlooked

by both the Secretary and the lower court.

(g) Appellant's Response.

In the instant case, Reed filed his Notice to Make Proof on March 8, 1961 (Ex. I, Tr. 13), and under date of March 13, 1961 received from the Nevada land office a form designated as "Instructions for Publication"together with a form entitled "Notice for Publication, Final Proof" (Ex. J, Tr. 13) and under date of May 11, 1961 he filed his "Homestead Entry Final Proof" (Ex. K) including affidavits in the form of sworn testimony taken before the officer designated by the Nevada land office as required by R. S. 2291, 43 U.S.C.A. 164.

It is submitted that this is all the corroboration required by the law, and that it is precisely the "* * *testimony of neighbors" referred to, by the court below (R. 126, supra) as "* * *sound, credible evidence of compliance* * *."

Turning to the final proofs filed by Reed, and in behalf of Reed (Exh. K, Admin. File) we find that these documents disclose that: the two statutory witnesses, one of them a 69-year old neighbor, the other a 40-year old neighbor, had both seen the land "many times"; that both statutory witnesses, under oath before the Government's designated official, testified that they lived in the vicinity; both must be presumed to have been aware of the provisions of 18 U.S.C., sec. 1001 referred to on the affidavits they signed, advising that it is a crime "* * *for any person knowingly or willfully to make to any Department or agency of the United States any false, fictitious, or fraudulent statements or representations as to any matter within its jurisdiction."

Oral testimony of Mr. Reed in the determinative crop year of

1961 establishes that (Tr. pps. 104 and 114-115) that Reed's custom was to prepare the soil in the fall and seed in the spring, so that the "1961 crop year" embraced both the fall of 1960 and the spring of 1961 (see particularly lines 2-26, Tr. p. 115). Taken with this oral testimony, the proofs submitted by Reed, and by his two witnesses (Ex. K) disclose the following, inter alia:

That Cecil Reed was 36 years of age when he made proof, about 4 years after entry; he was married, father of two minor children, a veteran of two years service in the Navy, honorably discharged; entered on May 25, 1957, cleared the land, lived on the land except for recited absences because of employment; drilled a well, built a house; cultivated 10 acres and planted same to rye in the 1959 crop year (fall of 1958, spring of 1959: and see oral testimony of Reed, line 15, p. 102 Tr., through line 7, p. 103 Tr.), harvested none of the crop; cultivated 20 acres in the 1961 crop year, planted the acreage to oats, constructed a dwelling in 1957; in 1960 contracted for a well and pump and in the same year built a pump house, with material and labor costs set out in the affidavits, supplying his own labor for a portion without assigning value to it.

Reed swore that he had no actual knowledge of any statement made by either of the witnesses in their testimony in conncection with his proof (Ex. K, Admin. File) and the Government-designated testimonial officer--the Douglas County Assessor -- certified that the entryman was examined separately and apart from witnesses in the case.

The sworn proof of the two witnesses affirms (Ex. K, Admin. File), with some variation in values of improvements, and from personal

observation, the essential and material points of Reed's own proof.

The foregoing, we submit, constitutes all of the corroboration required by statute, and all that was required in law, to qualify Reed for his patent.

/Note: The Secretary's decision, curiously, at p. 5 (United States v. Cecil Reed, A-30354, Sept. 29, 1965; Admin. File), in footnote 2, contains this observation:

> "It is rather remarkable that each of his witnesses, who was supposed to testify separately and of his own knowledge (43 CFR 1823.2-1, 1923.2-2), should make precisely the same mistake."

The "mistake" is the distinction made between cultivating in the fall and planting in the spring (see Tr. p. 107, lines 4-15), tied by the opinion writer to apparent disbelief --notwithstanding the testimonial officer's certificate -- that the witnesses did in fact testify separately.7

Returning to judicial precedent: the court below, in adopting language from Quock Ting v. United States, supra, overlooked quoting language from the same decision truly and directly applicable to the testimony of Reed's two statutory proof witnesses. Adopting language from Kavanaugh v. Wilson, 70 N.Y. 177, ____Atl. ____, the Supreme Court in Quock Ting quoted with approval as follows:

> "It is undoubtedly a general rule that when a disinterested witness, who is in no way discredited, testifies to a fact within his own knowledge, which is not of itself improbable, or in conflict with other evidence, the witness is to be believed, and the fact is to be taken as legally established, so that it cannot be disregarded by court or jury."

And there is direct support for this position, in another United States Supreme Court decision involving construction of the very statute (R.S. 2291, now 43 U.S.C.A. 164) here so germane.

In United States v. George, 228 U.S. 14 (1913), in that case the Supreme Court was called upon, in connection with appeal from a perjury indictment, to determine, inter alia, whether a regulation purporting to add to the requirements of proof set out in R.S. 2291 could be, or had been "added to" by regulations of the Department of the Interior. The Court said (228 U.S. 14, at pps 19-22) of R.S. 2291:

> It provided as follows: "* * *If* * *the person making such entry* * *proves by two credible witnesses that he, she, or they have resided upon or cultivated the same for the term of five years * * * and makes affidavit, that no part of such land has been alienated * * * and that he, she, or they will bear true allegiance to the government of the United States; then, in such case, he, she, or they * * * shall be entitled to patent." It will be observed that the facts required to be proved are stated, by what means proved, and the manner of proof and its quantum. The facts to be proved are (1) cultivation of and residence upon the land and (2) nonalienation and allegiance; the means of proof of the first being two credible witnesses; of the second affidavit of the claimant. In other words, the section is not only explicit as to what is to be proved, but in what manner proved; and what is required of the claimant himself, to wit, an affidavit, is distinguished from what he must establish by others, to wit, two credible witnesses. Such, then, are the conditions seemingly legislatively made the exact measure of the obligation of the homestead claimant. It certainly will not be asserted that they can be detracted from. It is asserted that they may be added to, by * * * certain sections of the Revised Statutes. We insert the sections in the margin / note: the insertions include R.S. 2478, now 43 U.S.C. 1201, the section relied upon by Interior as authority for its regulations providing for contest actions / It will be seen that they confer administrative power only. This is certainly so as to * * *sec. 2478 * * *: and certainly, under the guise of regulation legislation cannot be exercised. U.S. v. United Verde Copper Co., 196 U.S. 207. Especial stress, however is put upon Sec. 2246 (U.S. Comp. Stat. 1901, p. 1371) / note: now found as 43 U.S.C.A. 75 / * * *
>
> Acting under the authority presumed to be given by sec. 2241 and the other sections, a regulation was promulgated which prescribed forms of taking pre-emption and final homestead proof by questions and answers, and provided that "the claimant will be required to testify, as a witness, in his own behalf, in the same manner." It was testimony

exacted in pursuance of this regulation and to the manner directed by it which constitutes the charge of the indictment. It will be observed, therefore, that the claimant was required to testify as other witnesses. In other words, three witnesses were required; sec. 2261 requires two only, and, as we have said, points out what proof, in addition the claimant himself shall give. It is manifest that the regulation adds a requirement which that section does not, and which is not justified by sec. 2246. To so construe the latter section is to make it confer unbounded legislative power. What, indeed, is its limitation? If the Secretary of the Interior may add by regulation one condition, may he not add another? If he may require a witness or witnesses in addition to what sec. 2291 [note: now 43 U.S.C.A. 164] requires, why not other conditions, and the disposition of the public lands thus be taken from the legislative branch of the government and given to the discretion of the Land Department? It is not an adequate answer to say that the regulation must be reasonable. The power to make it is expressed in general terms. If given at all, it is as broad as its subject, and may vary with the occupant of the office. This is to make conditions of title, not to regulate those constituted by the statute * * *.

In U.S. v. Verde Copper Co., supra, this court considered the power of the Secretary of the Interior * * *. We said: "If (the regulation involved) is valid, the Secretary of the Interior has the power to abridge or enlarge the statute at will. If he can define one term, he can define another. If he can abridge, he can enlarge. Such power is not regulation; it is legislation."

* * * * * *

Appellant submits this proposition: the Supreme Court announced in U.S. V. George, supra, that the Department of the Interior had no power to add to the requirements of the law that cultivation and residence be proved by two credible witnesses. The law is still on the books. It is still the case that "* * *the facts required to be proved are stated, by what means proved, and the manner of proof and its quantum."

We respectfully submit that the Secretary erred, as did the lower court, in rejecting as fully corroborating evidence the

statutorily-required and defined evidence of official record [illegible] each in turn; that entryman Reed is entitled to patent to his full 160-acre entry.

Note: It will be observed that counsel for appellant, in the court below (R. 47) made an offer of proof "' ' 'to which the same is rejected on grounds that the evidence is limited to the Administrative Record Lodged with the Clerk.' This offer, while not set out in the court minutes, was plaintiff's effort to preserve his right to produce additional affidavits or direct testimony of the Reed proof witnesses, and additional witnesses in support of what counsel had thought -- until the Secretary's decision -- was already sufficient evidence of the entryman's compliance. 7

3. On the whole record, appellant-entryman is entitled to have his final proof allowed, when tested by "good faith" standards on both a legal and an equitable basis.

Here, because so much of the administrative determination pivoted around the point and because the lower court decision is silent on it, appellant simply incorporates by reference argument in support of this proposition contained in the record below. (R. 68-74, 43 U.S.C.A. 162; 43 C.F.R. 166.18 (1961 ed.)

Brief reference will suffice. The source of the good faith requirement is identified in Stewart v. Penny et al 238 F. Supp. 821. at 829-831, the court below quoting with approval as "an appropriate statement of the meaning of good faith" within the context of the statute and code found in Carr v. Fife 44 F. 713 (CC Wash. 1891).

as follows:

> " * * whether he [the applicant] had actually, within the time limited by law, established his residence upon the land, with the intention of acquiring it for a home; whether he had continued to actually reside upon the land; whether he was really engaged in improving the land, or in good faith intending to do so; or whether he was only making a colorable pretense of residing upon and improving the land * * * and acquiring it for speculative purposes, without complying with the terms of the homestead law."

In Stewart the court also found that the homestead laws should be liberally applied in favor of the entryman, citing in support Ard v. Brandon, 156 U. S. 537 (1895) and Clements v. Warner 24 How. 394, 16 L. Ed. 695.

In the instant case, the government's lone witness in the contest hearing below, Mr. Hagihari, the land examiner, volunteered his opinion, as follows:

* * * * *

> Q (by Mr. ABBOTT): How do you square this recommendation with your testimony this morning that there was no compliance with the cultivation entirely apart from the water?
>
> A (by Mr. HAGIHARI): He had attempted to comply with some of the requirements, had shown good faith. * * *
>
> Q: * * *Would you enlarge upon that ? How is that weighed?
>
> A: Good faith or intent that he is trying to comply with the regulations. In this case Mr. Reed had built a home on it. He had attempted to clear off 20 acres, and he established a home. (Tr. 57-58)

* * * * *

It is somewhat difficult to couple the foregoing with the court's declaration in Stewart, supra, "that the homestead laws should be liberally applied in favor of the entryman * * * and is not a matter of the whim or predisposition of the particular Secretary of the Interior who graces the office." The Nevada Federal district court then quoted with approval from Ard v. Brandon, supra, this language:

> "The law deals tenderly with one who, in good faith, goes upon the public lands, with a view of making a home thereon. * * *."

VI. CONCLUSION.

Included in the Index to Exhibits is one identified as "Letter dated March 12, 1962, addressed to President John F. Kennedy signed by Cecil R. Reed." (Ex. N. Tr. 13). Mr. Reed, asked (Tr. 111) why he wrote a letter to President Kennedy in 1962, replied:

* * * * * * *

> "Well, I did have a little argument with the Bureau of Land Management office, and I decided at that time that I would fight this through to the limit, and I figured I just as well start at the top and come down. * * *."

* * * * * * *

And so he did.

More than thirteen years after receipt on April 15, 1955 by the Nevada Land office of his application for homestead entry (Ex. P), Mr. Reed may ponder his reasons for filing as expressed on the record (Tr. 108):

* * * * * * *

> Q. (Mr. ABBOTT): But when you went on the land, why were you there ?
>
> A. (Mr. REED): Because I believed that a man

could make a living on a place like this, and I loved this part of the country very much.

. . . . . .

Appellant submits on all of the files, records, and pleadings in these proceedings and on the applicable legal and equitable principles that the decision of the lower court should be reversed and the case remanded below with appropriate instructions respecting issuance of patent to appellant.

Dated this 30th day of August, 1968.

Respectfully submitted,

CECIL R. REED Appellant

By George W. Abbott
his Attorney

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

George W. Abbott
George W. Abbott
Attorney for Appellant.

AFFIDAVIT OF SERVICE

STATE OF NEVADA)
: ss.
COUNTY OF DOUGLAS)

George W. Abbott, being first duly sworn, deposes and says: that on this 31st day of August, 1968, he served a copy of the Brief for the Appellant on counsel for the Appellees by mailing a copy thereof, postage prepaid to:

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George W. Abbott
George W. Abbott

Subscribed and sworn to before me
this 30th day of August, 1968.

Notary Public